Schapiro Exhibit 269

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED AND BOURNE CO., ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,,	)	
PLAINTIFFS, vs.	)	07 CIV. 3582(LLS)
YOUTUBE, INC., YOUTUBE, LLC AND GOOGLE, INC.,,	)	
DEFENDANTS.	)	
VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, AND BLACK ENTERTAINMENT TELEVISION, LLC,	)	
PLAINTIFFS, vs.	)	07 CIV. 2103 (LLS)
YOUTUBE, INC., YOUTUBE, LLC AND GOOGLE, INC.,,	)	
DEFENDANTS.	)	

VIDEOTAPED DEPOSITION OF COURTNEY NIEMAN
WEDNESDAY, DECEMBER 16, 2009
PALO ALTO, CALIFORNIA
Job No. 18293

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VIDEOTAPED DEPOSITION OF COURTNEY NEIMAN,

TAKEN ON BEHALF OF THE DEFENDANTS, AT 9:28 A.M., WEDNESDAY, DECEMBER 16, 2009 AT 650 PAGE MILL ROAD, PALO ALTO, CALIFORNIA BEFORE MARY JACKSON, CSR NO. 8688, PURSUANT TO NOTICE.

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identification.)

12:08 MR. KRAMER: Q. Do you recognize Exhibit 15?

12:08 A. Yes, I do.

12:08 Q. What is it?

12:08 A. It's a -- hang on. I'm getting to the page where there's actually printing. Holy smokes. We cut down a forest to do this one.

12:08 Q. Mm-hmm.

12:08 A. I don't recall this format of this report. However, I do recall the report in general. It was part of the weekly process of informing our clients what we did based on their instructions.

12:08 Q. In Exhibit 15, there is an e-mail exchange on the cover page between Bay and Viacom representatives including Ms. Hallie, Mr. Cahan, you're included as a cc. In the first in time message, Ms. Arizala says, "Please review the enclosed YouTube, Google Video, MySpace and Yahoo! Video approved notice sent rule."

12:09 A. Mm-hmm.

12:09 Q. Do you know what that's a reference to?

12:09 A. It would be, here's the report for the actions you told us to take.

12:09 Q. But I'm specifically asking about the

"approved notice sent rule," not the report itself.

12:09 A. I don't know what -- what Deana -- why she chose that phrase. But in my dealings with Deana as a manager, that's -- I would ask her what she meant by that.

12:09 Q. The last four pages of Exhibit 15 --

12:09 A. Yeah.

12:09 Q. -- are one-page charts entitled MTV Agent Asset Rule List for each of the four services Ms. Arizala mentions in her message: YouTube, MySpace, Google Video, and Yahoo! And there is a list of shows in common among each of the four lists. Do you see that?

12:10 A. Yes.

12:10 Q. Do you recognize this as the rules that BayTSP was to follow with respect to each of those services at the time?

12:10 A. I recall that this table was the representation of what client services, Deana, myself, understood as to how BayTSP was to enforce these titles.

12:10 Q. Got it. You were involved in helping to prepare these asset agent rule lists?

12:10 A. Inasmuch as the manager of client services e-mails, phone calls, yeah, I'm sure it came up.

12:11 Q. Okay.

12:11 A. Please do this; please do that.

12:11 Q. If you take a look at the -- let me see if I can do it this way. Can you explain to me what these rules were looking at, these charts as of November 6th, 2006?

12:11 A. Yes. We will take, for example, column one would be the content order. So Spice TV, Comedy Central, Viacom in general, Country Music Television, blah, blah, blah. The second one would be the specific network of that content holder that those titles belong to. And then notices were to be sent on the complete entire show versus a clip, some subset, and, with God as my witness, I don't remember what -- other than looking at it here, that the rule would be to -- would be used to define what is a clip.

12:12 Q. On which action should be taken, right?

12:12 A. Yeah. So full was fairly straightforward. It's the whole episode. Whereas -- whether it had commercials or not was irrelevant. It was, did you have the whole show? Clip would have been anything less than the whole show. So two and a half would be in minutes as opposed to seconds or days or greater.

12:12 Q. So these charts reflect that at this time, the full episode rule was in effect at YouTube, right?

12:12 MR. COX: Objection. Document speaks for itself.

12:12 MS. COLEMAN-BISHOP: Mischaracterizes -- objection mischaracterizes the document.

12:13 THE WITNESS: Okay. I'm lost.

12:13 MR. KRAMER: Q. Sure.

12:13 A. Because I don't -- as I read this, these rules for engagement were for -- "please review the enclosed YouTube, Google Video, MySpace, Yahoo! Video."

12:13 Q. We have one page for each of the four services that you just mentioned, and on each page there are the rules that you just described, but they differ.

12:13 A. Oh, okay.

12:13 Q. So for the page entitled YouTube Approved Notice Sent, which is the first of the four charts --

12:14 A. Yes. There is full rule -- full assets is the rule for the YouTube page; full assets is for the Google page; full assets and some clips for MySpace; and full assets and some clips for Yahoo!

That's what that tells me.

12:14 Q. And my question is, do you have any insight into why the rules for YouTube and Google Video were different than the rules for MySpace and Yahoo! at the time?

12:14 A. No.

12:14 MS. COLEMAN-BISHOP: Objection. Calls for speculation.

12:14 THE WITNESS: No, I do not.

12:14 MR. KRAMER: Q. Were you communicating Viacom's takedown rules to YouTube at the time?

12:14 A. No.

12:14 Q. Why not?

12:14 A. We didn't communicate our practices to anyone. To -- I mean inasmuch as I didn't tell YouTube or MySpace or AT&T or Canada Net, I didn't tell -- I and none of my staff would have communicated any rules. We just sent the DMCA notice.

12:15 Q. Were you under instructions not to reveal Viacom's takedown rules to YouTube?

12:15 A. If it's in the -- if it's in my NDA or work rules. I don't remember somebody giving me an explicit instruction. I don't recall somebody saying, don't tell, but --

12:15 Q. Do you think it would have helped YouTube follow Viacom's wishes with respect to having its content appear on YouTube --

12:15 MS. COLEMAN-BISHOP: Objection. Calls for speculation. No matter where you go with the question, it's going to call for speculation.

12:15 MR. KRAMER: Yeah, but you have to let me get the question so the record's clear, and then you can object. And if I think your objection --

12:16 MS. COLEMAN-BISHOP: Don't lecture me on how to defend a --

12:16 MR. KRAMER: No, Counsel, it's not just proper. It's just not proper. You have to let me get the question out so we can make the record, and then if you have an objection, you can make it. I can decide whether I want to restate the question or not. But if you object in the middle of the question, we don't even know whether your objection is going to be meritorious. So just wait until I get the question out. That's all. Just courtesy. Okay?

12:16 MR. KRAMER: Q. Do you think it would have helped YouTube follow Viacom's wishes with respect to having its content appear on YouTube if Viacom had communicated these kinds of rules to

putting them together and creating a new -- a new piece of art, a new whatever you want to call it, putting a new voice stream over a clip for humor sake. That's -- taking more than one piece of original work and reworking it to come up with something else.

1:11 And that's when I -- someone told me about Andy Warhol. I mean I knew of the images. I just didn't realize that was of consequence. He took something everybody knew, an icon, and did something to it and made it different. So Andy Warhol's pictures, in my mind, were a mash-up.

1:11 What defines a clip? I don't know that I ever got that answered. You know, let's go to the clip. You know, in sports, I don't know. So I don't know. It was -- it was struggling to understand the process.

1:11 Q. So the next question on the list is one about which I'd like to ask you. You asked Mr. Ishikawa, "Is setting any time limit arbitrary?" Sitting here today, do you believe that setting time limits for the clips that should be taken down versus the clips that should be left up was an arbitrary process?

1:12 MS. COLEMAN-BISHOP: Object to form.

1:12 THE WITNESS: I don't have an opinion.

1:12 MR. KRAMER: Q. Okay. How about back when you were a manager at BayTSP?

1:12 A. Same answer. I didn't have an opinion. Did what I was told.

1:12 MR. COX: Same objection.

1:12 MR. KRAMER: Fair enough.

1:12 MS. COLEMAN-BISHOP: Can I ask a quick question here?

1:12 MR. KRAMER: Sure.

1:12 MS. COLEMAN-BISHOP: Courtney, what exactly is a mash-up? What is your understanding of one?

1:12 THE WITNESS: Two or more pieces of original work being put together to create a third.

1:12 MS. COLEMAN-BISHOP: Okay.

1:13 (Whereupon Exhibit No. 18 was marked for identification.)

1:13 MR. KRAMER: Q. Okey doke. Exhibit 18 is an e-mail exchange between BayTSP and MTVN representatives on which you were copied with the subject line, Video Takedown 11/14/2006. And contained within the e-mail exchange itself, there is a report entitled MTV Network's Video Takedown Update. That's at the bottom of the first page.

The title is on the bottom of the first page. Then the report starts on page 2.

1:14 A. Yes.

1:14 Q. Let me ask you if you've seen reports like this at BayTSP?

1:14 A. Yes.

1:14 Q. This is a report on the application of the Viacom takedown effort through BayTSP on that day, November 14th, 2006, right?

1:14 A. Yes.

1:14 Q. And in the chart at the top of page 2 there are the four services that we looked at earlier: YouTube, MySpace, Yahoo! Video, and Google Video, right?

1:14 A. Yes.

1:14 Q. So am I reading the chart correctly in saying that it shows on that day BayTSP sent takedown notices for 22 episodes and 36 clips on YouTube?

1:14 A. Yes.

1:14 Q. Okay. In the next column it says, "Passed on." Do you know what that means?

1:15 A. Means we determined what we saw didn't fall within the rules that we had been given, too long, too short, it wasn't the clip.

1:15 Q. So on that day, Bay found and sent takedown notices to YouTube for 58 videos containing what it thought was Viacom content?

1:15 A. Yes.

1:15 Q. And on that day, it also found and left out or passed on 555 videos on the YouTube service, right?

1:15 A. Of the ones they reviewed, yes.

1:15 Q. So 555 clips that were passed on because they fell outside of Viacom's takedown rules, right?

1:15 MR. COX: Objection. Asked and answered.

1:15 THE WITNESS: Trying to make sure I understand. I believe that is correct.

1:16 MR. KRAMER: Q. And the reason that BayTSP left up on YouTube those 555 clips it found was because Viacom directed BayTSP to leave them up, right --

1:16 MR. COX: Objection. Calls for speculation.

1:16 MR. KRAMER: Q. -- as part of its instructions?

1:16 A. No, that would not be correct.

1:16 Q. Why is that not correct?

1:16 A. We were not given instructions, per se, of what to leave up.

1:16 Q. Fair enough. The converse of an instruction to take something down, however, is it implicitly to leave it up, right?

1:16 A. Yes.

1:16 Q. Okay. In the next table down in the document, there's a chart labeled P2P?

1:17 A. Yes.

1:17 Q. Can you explain what that shows?

1:17 A. Those were files that we found on those three P2P networks: Gnutella, eDonkey and BitTorrent.

1:17 Q. That you believed contained Viacom content?

1:17 A. Yes.

1:17 Q. And so on that day, BayTSP representatives identified 7,626 pieces of Viacom content on the BitTorrent service, correct?

1:17 A. That's what this report would suggest.

1:17 Q. So Bay had found a far greater volume of what it thought was Viacom content on P2P networks that day than it had found on YouTube, right?

1:17 MR. COX: Object to the form.

1:18 THE WITNESS: It would be an inaccurate comparison.

1:18 MR. KRAMER: Q. Hmm. Well, I suppose I

should ask you why that's an inaccurate comparison.

1:18 A. Why can't you make a Yugo go as fast as a drag race rail car?

1:18 Q. I take it you're a fan of car racing. I'm getting that sense.

1:18 A. It is not designed to do so. Why can't you find bags of oranges that have counts of upwards to 1,000 like you would if you bought a bag of peanuts? It's apples and oranges. You can't make that comparison.

1:18 The kind of things you can find on a P2P network have a broader base, a global base, than you would find on a particular video service regardless of service. So --

1:19 Q. Can you elaborate on that?

1:19 A. There's no relationship between the number we found or passed on a service -- on a single point of source, MySpace server, than we would find on the untold -- and I say that because I don't know -- the untold number of BitTorrent servers that are out there on the planet Earth. There's more possibilities to find things on BitTorrent than you would find on YouTube or MySpace or whatever just because of the sheer number of source points.

1:19 Q. Okay. Let's -- let me come it at slightly

differently. In the chart beneath the P2P chart there's a list by asset of Viacom content --

1:20 A. Mm-hmm.

1:20 Q. -- that rolls up into the 22 episodes, 36 clips and 556 clips passed on for the day, right?

1:20 A. Yes.

1:20 Q. And so on that given day Viacom encountered 316 different pieces of content on the YouTube service that appeared to contain content from South Park, it took down one clip?

1:20 A. Yes.

1:20 Q. It took down one clip, and it passed on 315, correct?

1:20 A. Yes.

1:20 Q. So I'm reading that correctly. The counts for the P2P services that appear in the chart above the asset-by-asset breakdown --

1:20 A. Mm-hmm.

1:20 Q. -- those counts were for the same list of assets that appear in the breakdown beneath it, right?

1:20 MR. COX: Object to form, lacks foundation.

1:21 THE WITNESS: I don't know in that -- the start of this, I don't know if the P2P chart refers

to the assets below or the asset above, the European Music Awards 2006 or to the asset list below. I don't remember.

1:21 MR. KRAMER: Q. Take a look, if you would, at the page that starts -- the page that ends with the Bates No. BayTSP 522. See that's the topic heading P2P Not Sent?

1:21 A. Excuse me. Yes.

1:21 Q. And there's a breakdown by asset which matches the same assets in the --

1:21 A. Okay.

1:21 Q. -- prior YouTube chart, right?

1:21 A. Yes. Okay.

1:21 Q. So the totals in the P2P chart for each of the three P2P services, Gnutella, eDonkey and BitTorrent, those correspond to the specific list of assets that BayTSP was charged with identifying for YouTube as well, correct?

1:22 A. Yes.

1:22 MR. COX: Object to the form.

1:22 MR. KRAMER: Q. So am I reading the chart correctly that on this day, November 14, 2006, with respect to P2P services, BayTSP identified some 6500 pieces of content on P2P networks that it believed contained content from Viacom's show South

1:30 MR. KRAMER: Q. So Exhibit 20 is an e-mail exchange you had with a gentleman by the name of Micah Schaffer at YouTube. Started at the bottom with others on the chain at BayTSP, and Ms. Gillette is a cc shown on the last in time e-mail dated November 29, 2006. The subject line is Please Take This Down Immediately.

1:30 A. Yes.

1:30 Q. Do you recognize this document?

1:31 A. Yeah.

1:31 Q. Okay. Your first message has a list of URLs identifying clips on the YouTube service that you wanted removed, right?

1:31 A. Yes.

1:31 MR. COX: Objection. Document speaks for itself.

1:31 MR. KRAMER: Q. Do you remember that these documents -- that these were full episodes of the show South Park from a YouTube user with the name South Park Studios?

1:31 A. Other than my e-mail says that, no. There's nothing about a YouTube URL that gives you any indication of what it is.

1:31 Q. Fair enough. Do you remember that there was a user on the YouTube service with the user name

South Park Studios?

1:31 A. I don't have any specific memory of it, but it would be a memory of one of hundreds of accounts, so . . .

1:31 Q. You're aware that South Park Studios is the name of a Viacom-related entity, right?

1:32 A. I don't know. I don't remember.

1:32 Q. Well, you -- you wrote in your message that's the last in time at the top, "Under normal circumstances, I would be cheering right now. Please be prepared to reinstate that account" --

1:32 A. Mm-hmm.

1:32 Q. -- "if and when it's determined that South Park Studios is actually an authorized activity of Comedy Central." So you thought it was possible that the clips that you were identifying had been uploaded to YouTube by someone authorized to do it, right?

1:32 A. Yes. That's the way I would read this.

1:32 Q. By the way, YouTube took down, immediately, the clips that you sent to it --

1:32 A. Yes.

1:32 Q. -- right? Now, Ms. Nieman, couldn't you tell from the user name South Park Studios that the clips had been uploaded to YouTube by someone with

the authority to upload them?

1:33 MR. COX: Object to the form.

1:33 THE WITNESS: No. There's nothing about a name that suggests anything about the owner.

1:33 MR. KRAMER: Q. Could you tell by looking at the clips that they had not been uploaded to YouTube by someone at Viacom with the authority to do it?

1:33 A. No.

1:33 Q. Why not?

1:33 A. An episode of South Park is an episode of South Park. There's nothing that makes it identifiable -- the source of the clip identifiable other than that there is a screen name attached to it, a screen name which doesn't tell me anything about the owner of the screen name. So, no, there's no chain from clip to source. If the source comes forward, we have taken down somebody -- taken down somebody's content and they can prove they're the owner, then across the board, it was BayTSP's policy to send a retraction because that's what the DMCA says to do.

1:34 Q. Well, if they were full episodes of South Park though, Ms. Neiman, couldn't you tell that they weren't authorized?

1:34 A. No.

1:34 Q. Why not?

1:34 A. There were no rules at the time for a time limitation -- when I first became aware of YouTube, MySpace, video sharing, videos were five minutes, videos were an hour, videos were two hours. There was no rule that said, okay, you can't put up just part of it. And there was nothing there -- from the videos that I watched, I don't recall ever seeing an entire movie, hundred and two minutes in its entirety. But I can think of a number of times, including now, where you can see whole content on YouTube.

1:35 I like watching the Glenn Beck show. It is approximately a 38-minute, sucking out commercials, and some people put it up in two parts. Some people put it up in six parts. Some people put it up in -- so the point is, nothing about the clip identifies its source.

1:35 Q. Okay. But couldn't you tell if it was a full episode of South Park, that it wasn't authorized to be there?

1:35 A. No.

1:35 Q. The whole thing was there. Doesn't that give it away?

1:35 MR. COX: Object to the form.

1:36 THE WITNESS: No.

1:36 MR. KRAMER: Q. Do you think it's likely that someone with authority to do it at Viacom was uploading full episodes of South Park to YouTube?

1:36 MS. COLEMAN-BISHOP: Objection. Asked and answered, argumentative. She's already said no. She's not able to identify whether or not any one of these full episodes had any authority to be posted or did not.

1:36 MR. KRAMER: Okay.

1:36 MS. COLEMAN-BISHOP: There's no way to tell from a full episode whether or not the person that uploaded it had authority. No matter how many times you ask the question, you're going to get the same answer. The answer's no.

1:36 THE WITNESS: I'm with her.

1:36 MR. KRAMER: Q. You agree with the sentiment your attorney just expressed?

1:36 A. Yeah. There is no connection between what you see in YouTube, the person who posted it, and the person who produced it. There is no identifiable link.

1:36 Q. Meaning there's no way to tell --

1:36 A. Correct.

1:36 Q. -- whether it's authorized?
1:36 A. Correct.
1:37 (Whereupon Exhibit No. 21 was marked for identification.)
1:37 MS. COLEMAN-BISHOP: Can we go off the record just one second?
1:37 MR. KRAMER: Sure. Off the record.
1:37 THE VIDEOGRAPHER: The time is 1:38. Off the record.
1:37 (Whereupon a recess was taken.)
1:37 THE VIDEOGRAPHER: Time is 1:38. On the record.
1:37 MR. KRAMER: Q. Okay.
1:37 A. Okay.
1:37 Q. Ms. Nieman, Exhibit 21 is a similar e-mail exchange you had with someone named Misty at YouTube the same day as Exhibit 20, right?
1:38 A. Yes.
1:38 Q. Your message starts with the same list of clips on YouTube and the same requests, "Please take this down immediately." Misty responds that she removed the videos but she, too, thought that the account might have been set up by Comedy Central. Do you see that?
1:38 MR. COX: Object to the characterization

of the document.

1:38 THE WITNESS: I don't know what Misty was thinking. As I read this, she had some belief that they may have come from a valid source.

1:38 MR. KRAMER: Q. And you wrote, "Referring to this account, South Park Studios, they are associated with Comedy Central, but MTVN has the exclusive rights"?

1:38 A. Yes.

1:38 Q. So you thought at that point that the user South Park Studios was associated with Comedy Central, right?

1:38 A. I believe our client informed us of that.

1:39 Q. Do you recall who specifically?

1:39 A. No, I do not.

1:39 Q. Can you turn back to Exhibit 8, which is the work digest for Project 1 for MTV?

1:39 A. Got it.

1:39 Q. And if you could look at the second page of Exhibit 8 --

1:39 A. Yes.

1:39 Q. Under where it says, "Description of Activity," it says, "YouTube is no longer an active protocol in Project 1 because of the implementation of Project 2." Do you know what that means?